



Claimant testified that at the time she fell, she injured her wrist, elbow and right shoulder.<sup>1</sup> Claimant completed a form entitled “Associate Statement – Workers Compensation” for respondent on the date of her fall. The form asks, “What Part(s) of Your Body Were Injured.” Claimant then wrote: “as far as I can tell especially wrist & forearm[,] elbow is bruised.” Claimant did not list a shoulder injury on the accident form.<sup>2</sup>

Respondent admitted a fall on July 13, 2007, caused injuries to claimant’s right wrist and elbow and has provided claimant with medical treatment for her right wrist and elbow injuries including surgery. However, respondent denies claimant suffered a right shoulder injury arising out of and in the course of her employment.

In Docket No 1,051,406, claimant alleged she hurt her right upper extremity and right shoulder as a result of the fall and a series of repetitive traumas from “7/13/07 - 06/30/2010 or last day of work whichever is later.”<sup>3</sup> Claimant listed as the exact cause and source of accident, “Employee got her pant leg caught on plastic bin causing her to fall and subsequent injury due to overuse of right upper extremity in stocking store products.”<sup>4</sup> On June 30, 2010, claimant filed her applications for hearing in both claims and alleged injuries to the “Right upper extremities [*sic*] and right shoulder, BAW, but full extent of injuries unknown at this time.”<sup>5</sup> At the preliminary hearing, claimant indicated she was still employed by respondent.

On July 13, 2007, claimant went to the KU MedWest clinic for examination. Claimant alleges she told health care workers at the clinic that she injured her right shoulder, “but they said it wasn’t authorized.”<sup>6</sup> Claimant did not indicate the specific person at KU MedWest clinic that said this. A July 13, 2007, record from KU MedWest Occupational Health indicates claimant stated, in part: “I fell backward and landed on my right arm and wrist. My wrist is very painful. I hurt my back as well.”<sup>7</sup> Claimant was eventually referred to Dr. John B. Moore, IV, a plastic and reconstructive surgeon. Dr. Moore’s records reflect that he saw claimant for the first time on August 17, 2007, and

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<sup>1</sup> P.H. Trans. at 6-7.

<sup>2</sup> *Id.*, Resp. Ex. A.

<sup>3</sup> Application for Hearing, Docket No. 1,051,406 (filed June 30, 2010).

<sup>4</sup> *Id.*

<sup>5</sup> Application for Hearing, Docket No. 1,051,405 (filed June 30, 2010); Application for Hearing, Docket No. 1,051,406 (filed June 30, 2010).

<sup>6</sup> P.H. Trans. at 8.

<sup>7</sup> *Id.*, Resp. Ex. B.

initially treated claimant's right hand and wrist conservatively with a rigid splint and medications.

When more conservative treatment did not relieve claimant's symptoms, Dr. Moore tried a steroid injection in claimant's right wrist joint which, unfortunately, failed to resolve claimant's right wrist problems. A letter dated December 10, 2010, written by Dr. Moore to CMI states that claimant underwent a right carpal tunnel release and cubital tunnel release three months earlier.

On October 23, 2007, and November 20, 2007, Dr. Moore noted claimant's work status was full duty with splint, which is described as: "Patient can perform all regular duties – he/she is capable of wearing the splint. There may be several jobs or motions that the patient is incapable of performing with the splint which should, therefore, be restricted. A 20-50 pound lifting restriction would be advised for a patient wearing a splint to prevent a heavy load accidentally."<sup>8</sup> Dr. Moore noted the same work status for claimant on August 17, 2007, but on that date it appears the lifting was limited to 20 pounds.<sup>9</sup> Sometime after the July 2007 accident, respondent moved claimant to the lingerie department, as this job did not require as much hand movement.<sup>10</sup>

In a letter dated January 22, 2008, to CMI Dr. Moore stated:

Today she has three complaints. The first is pain in her right anterior shoulder over the shoulder capsule but also over the end of the distal clavicle. This is the first time she has mentioned this right shoulder pain to me but she states it has been present since the original fall. I have no evidence in my medical record that this is the case but if treatment for the right shoulder is also approved I would recommend she be seen by Dr. Vito Carabetta for evaluation and conservative treatment of the right shoulder pain. If treatment for the right shoulder complaint is approved we will arrange for the referral to Dr. Carabetta.<sup>11</sup>

However, claimant indicates she told Dr. Moore about her right shoulder injury when she first saw him and does not know why there is no mention of her right shoulder injury in his records until January 22, 2008. In describing her current right shoulder problems at the preliminary hearing, claimant indicated that if she has something in her hand and tries to draw it to her she gets pain in the shoulder.

Claimant was referred to Dr. Michael M. Hall, an orthopedic specialist, for a consultation for her right shoulder, wrist and hand. In an April 16, 2008, letter to CMI,

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<sup>8</sup> *Id.*, Resp. Ex. A.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*, at 18-19

<sup>11</sup> *Id.*, Cl. Ex. 1.

Dr. Hall indicated he saw claimant that date and she was working at full duty with a splint. According to Dr. Hall, x-rays of the shoulder demonstrated some AC arthrosis, no high-riding humerus and no destructive lesions. His assessment was that claimant had a possible impingement syndrome and AC arthrosis, neither related to work. In his December 10, 2010, letter, Dr. Moore indicated claimant still had right shoulder pain and strongly recommended claimant be referred to an orthopedic surgeon specializing in the shoulder for evaluation and treatment of her shoulder.

In 1995, claimant settled a workers compensation claim with regard to her upper extremities that involved another employer. A letter from Dr. William O. Reed, Jr., dated February 2, 1995, indicated claimant had adhesive capsulitis in her right shoulder.<sup>12</sup> Claimant indicated she underwent physical therapy but had no other treatment for her right shoulder from 1995 through 2007. She further indicated that the right shoulder problems in 1995 were in the muscles, not in the joint. Respondent argues there is no contemporaneous evidence to suggest claimant's right shoulder was injured in the present claim or that her preexisting condition was aggravated while working for respondent.

Respondent refused medical treatment for the shoulder and claimant requested a preliminary hearing. The ALJ ordered respondent to provide treatment for claimant's right shoulder with either Dr. Lowry Jones or Dr. Craig Saterlee, whomever was available first. Thus, the Order of the ALJ implies claimant's right shoulder injury arose out of and in the course of her employment. However, the ALJ did not specifically indicate whether claimant's right shoulder injury arose out of a single incident on July 13, 2007, (as alleged in Docket No. 1,051,405) or through a series of repetitive traumas commencing July 13, 2007, and ending June 30, 2010, or claimant's last day of work, whichever is later (as alleged in Docket No. 1,051,406).

In order to determine if claimant is entitled to medical treatment for her right shoulder, the issue of whether claimant's right shoulder injury arose out of and in the course of her employment must be resolved. This Board Member finds that this issue is clearly within the Board's jurisdiction as set out in K.S.A. 44-534a. The Board has issued numerous orders in the past finding that it has jurisdiction in similar situations. In *Glyn*,<sup>13</sup> a Board Member stated:

But in this instance, the issue raised was whether claimant's current condition and need for medical treatment was caused by the work-related accidental injury. The undersigned Board Member concludes the Board does have jurisdiction to review the preliminary hearing issue of whether an injured worker's symptoms stem from the work-related accident as that issue is, in essence, tantamount to

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<sup>12</sup> *Id.*, Resp. Ex. A.

<sup>13</sup> *Glyn v. JE Dunn Construction Co.*, No. 1,051,284, 2011 WL 1330708 (Kan. WCAB Mar. 31, 2011).

whether a worker has sustained an injury that arises out of and in the course of employment.

A claimant in a workers compensation proceeding has the burden of proving by a preponderance of the credible evidence the right to an award of compensation and to prove the various conditions on which his or her right depends.<sup>14</sup> A claimant must establish that his or her personal injury was caused by an “accident arising out of and in the course of employment.”<sup>15</sup> The phrase “arising out of” employment requires some causal connection between the injury and the employment.<sup>16</sup>

Claimant alleges she told health care workers at KU MedWest clinic on the date of the accident that she injured her right shoulder, but they failed to document this fact. However, it was documented that she told them she fell on her right arm. Claimant indicates she told Dr. Moore when she first saw him about her right shoulder. However, the earliest mention of claimant’s right shoulder injury by any medical provider was in Dr. Moore’s letter of January 22, 2008. His letter on that date indicated it was the first time claimant expressed a concern about her right shoulder to him. The accident form completed by claimant for respondent on the date of the accident does not mention a shoulder injury.

Dr. Hall opined claimant’s right shoulder injury was not work-related and indicated x-rays of her right shoulder showed some AC arthrosis. However, Dr. Hall did say: “I think she may have pathology in her shoulder, however, one would expect if the fall was responsible for it, it would be documented.”<sup>17</sup> Thus, it appears he found the right shoulder injury was not work related on the basis that claimant’s complaint of right shoulder symptoms was not documented until Dr. Moore did so on January 22, 2008.

After claimant’s fall on July 13, 2007, she returned to her employment, but at some point was given a different job in the lingerie department, which required less hand movement and is not a heavy job. Little testimony was elicited from claimant supporting her allegation that she injured her right shoulder in a series of mini-traumas from July 13, 2007, through June 30, 2010, or her last day of work, whichever is later. Claimant adamantly indicated she hurt her shoulder when she fell on July 13, 2007. She alleges that on the same date, she told employees of the KU MedWest clinic she injured her right shoulder. Claimant insists she told Dr. Moore prior to January 22, 2008, that she injured her right shoulder in the fall.

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<sup>14</sup> K.S.A. 2007 Supp. 44-501(a); *Perez v. IBP, Inc.*, 16 Kan. App. 2d 277, 826 P.2d 520 (1991).

<sup>15</sup> K.S.A. 2007 Supp. 44-501(a).

<sup>16</sup> *Pinkston v. Rice Motor Co.*, 180 Kan. 295, 303 P.2d 197 (1956).

<sup>17</sup> P.H. Trans., Resp. Ex. A.

This Board has encountered many cases where a worker suffers an injury and then returns to the same work duties. After returning to work the worker, through a series of repetitive injuries, then aggravates the pre-existing condition. Claimant alleges she suffered a right shoulder injury due to her fall on July 13, 2007. However, scant evidence was presented to support claimant's allegation of a series of microtraumas which aggravated her right shoulder injury originally suffered on July 13, 2007.

The ALJ had the opportunity to observe claimant, hear her testimony and weigh her credibility. After doing so, the ALJ required respondent to provide treatment for claimant's right shoulder, thus inferring she was a credible witness and that she suffered an injury to her right shoulder arising out of and in the course of her employment. Claimant's testimony concerning the July 13, 2007, incident appears credible. The fact that she told workers at the KU MedWest clinic that she fell on her right arm bolsters her claim that she injured her right shoulder on July 13, 2007.

Accordingly, this Board Member finds that by the barest of margins claimant has proven by a preponderance of the evidence that on July 13, 2007, she suffered an injury to her right shoulder arising out of and in the course of her employment. However, this Board Member finds claimant failed to prove she injured or aggravated her right shoulder through a series of repetitive microtraumas due to the overuse of the right upper extremity in stocking store products.

By statute the above preliminary hearing findings are neither final nor binding as they may be modified upon a full hearing of the claim.<sup>18</sup> Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2010 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.<sup>19</sup>

**WHEREFORE**, the undersigned Board Member affirms the April 13, 2011, Order entered by ALJ Howard.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of June, 2011.

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THOMAS D. ARNHOLD  
BOARD MEMBER

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<sup>18</sup> K.S.A. 44-534a.

<sup>19</sup> K.S.A. 2010 Supp. 44-555c(k).

c:     Timothy M. Alvarez, Attorney for Claimant  
       Michael R. Kauphusman, Attorney for Respondent and its Insurance Carrier  
       Steven J. Howard, Administrative Law Judge